

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 Ashwin KHOBRAKAGE,

11 Plaintiff,

12 v.

13 COVIDIEN LP,

14 Defendant.

Case No.: 16-cv-0468-WQH-AGS

**ORDER GRANTING UNOPPOSED
MOTION FOR A RULE 35 MENTAL
EXAMINATION (ECF No. 26)**

15
16 Defendant's motion for a Rule 35 mental examination (ECF No. 26) is granted.
17 Plaintiff did not oppose the motion. Under Civil Local Rule 7.1.f.3.c, if a party fails to file
18 an opposition, "that failure may constitute a consent to the granting of a motion." But even
19 considering the merits of defendant's motion, the Court finds good cause to order the
20 examination.

21 A court "may order a party whose mental or physical condition . . . is in controversy
22 to submit to a physical or mental examination by a certified examiner." Fed. R. Civ.
23 P. 35(a); *Nguyen v. Qualcomm Inc.*, No. 09-1925-MMA (WCG), 2013 WL 3353840, at *2
24 (S.D. Cal. July 3, 2013) ("The moving party has the burden to show that the condition for
25 which examination is sought is 'in controversy' and there exists 'good cause' for the
26 examination." (citation omitted)).

27 Plaintiff's mental condition is in controversy because plaintiff alleges severe
28 emotional distress in his complaint. (*See, e.g.*, Pl.'s Compl., ECF No. 1, at ¶¶ 54, 63, 66,

1 77, 82, 86, 88, 90, 93, 94, 95, 105.) Defendant has shown good cause because it alleges
2 that plaintiff had several episodes throughout his life suggesting he suffers from
3 psychological issues, which strain the causal relationship between defendant's alleged
4 conduct and plaintiff's alleged emotional distress. (*See* Pl.'s Dep., ECF No. 26-2, at 5-27.)

5 According to defendant, plaintiff objected because the examination would be
6 performed by defendant's expert who, by plaintiff's standards, is not an "independent"
7 medical examiner. (*See* ECF No. 26-1, at 9-10.) Rule 35 does not require that the examiner
8 be uninterested: the proposed examiner need only be "suitably licensed or certified." *Redon*
9 *v. Ruiz*, No. 13cv1765-WQH(KSC), 2015 WL 13238642, at *4 (S.D. Cal. Dec. 4, 2015).
10 "Although the Court is not required to accept defendants' proposed examiner as the
11 examining psychologist, only if plaintiff raises a valid objection will the Court appoint a
12 different examiner." *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 609 (C.D. Cal.
13 1995) (citation omitted). Plaintiff has made no such showing, and in any event, plaintiff
14 will have the opportunity to impeach the expert's opinions at trial with any evidence of
15 bias.

16 Accordingly, the Court grants defendant's motion to compel a Rule 35 examination.
17 To allow sufficient time to implement this order, the Court extends the deadline to
18 supplement expert reports to April 20, 2018. All the other dates and provisions in the
19 scheduling order (ECF No. 22) remain unchanged.

20
21 Dated: March 27, 2018

22 
23 Hon. Andrew G. Schopler
24 United States Magistrate Judge
25
26
27
28